

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 9th December, 2013

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RFA 23/2013

RAVI KANT & ANR.

..... Appellants

Through: Mr. Vivek Srivastava, Adv.

versus

GEETA MISHRA & ORS

..... Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 23rd July, 2012 of the Court of the Addl. District Judge (3) North, Tis Hazari Courts, Delhi in Civil Suit No.107/08 (Unique Case ID No.02401C0421232006) filed by the respondent no.1, though dismissing the claim of the respondent no.1/plaintiff for specific performance of an Agreement of Sale of immovable property but directing the appellants and the respondents no.2 to 5 to refund/reimburse to the respondent no.1/plaintiff the amount of Rs.2 lacs paid by the respondent no.1/plaintiff at the time of execution of the Agreement to Sell along with interest @ 8% per annum from the date of institution of the suit till realization.

2. Notice of the appeal was issued and Shri Niraj Kumar, Advocate filed *Vakalatnama* on behalf of the respondent no.1/plaintiff. Vide order dated 26th July, 2013 the delay of 40 days in filing the appeal was condoned, the appeal admitted for hearing, the Trial Court record requisitioned and on deposit of the “remaining decretal amount” in this Court, execution of the decree for recovery of money against the appellants and the respondents no.2 to 5 was stayed. It was disclosed on that date that the appellants had already refunded a sum of Rs.50,000/- to the respondent no.1/plaintiff. Finding the controversy within a narrow compass, the appeal was listed for hearing on 11th November, 2013. Thereafter the respondent no.1/plaintiff stopped appearing. However in the interest of justice, adverse orders were deferred on 11th November, 2013 and the appeal listed for hearing for today.

3. Today also none has appeared for the respondent no.1/plaintiff inspite of passover. It is not deemed necessary to await the respondent no.1/plaintiff any further. The counsel for the appellants has been heard. Though the respondents no.2 to 5 remain unserved but finding that their interest is the same as the appellants, their service is dispensed with.

4. The contention of the appellants is twofold. It is contended that the learned Addl. District Judge having held that the respondent no.1/plaintiff

was not ready and willing to perform her part of the agreement and which finding has attained finality as the respondent no.1/plaintiff, as recorded in the order dated 26th July, 2013, has not preferred any appeal, the learned Addl. District Judge could not have directed refund of the amount paid by the respondent no.1/plaintiff at the time of entering into the Agreement to Sell. To meet the reliance placed by the learned Addl. District Judge on the judgments in *Fateh Chand Vs. Balkishan Dass* (1964) 1 SCR 515 and *Balwant Singh Vs. Ram Charan* 190 (2012) DLT 589, it is contended that the appellants and the respondents no.2 to 5 in the present case had proved the loss suffered by them on account of breach/non-performance by the respondent no.1/plaintiff. Attention in this regard is invited to para 49 of the judgment where the learned Addl. District Judge has referred to the evidence led by the appellants and the respondents no.2 to 5 of further advance of Rs.1.5 lacs paid by them for purchase of another property having been forfeited. It is contended that the said aspect was ignored while directing refund. It is further argued by the counsel for the appellants that the respondent no.1/plaintiff had not challenged the forfeiture of the amount of Rs.2 lacs in the suit and no issue also on the said aspect was framed but the learned Addl. District Judge in the impugned judgment has re-casted the

issues, framing an issue on the said aspect, when it did not even arise from the pleadings. It is contended that in the absence of any pleading, the learned Addl. District Judge could not have in any case granted the said relief to the respondent no.1/plaintiff. The counsel for the appellants however fairly informs that the learned Addl. District Judge at the time of hearing did indicate that the issues will be re-cast but it was not informed that such an issue on the aspect of forfeiture was being framed.

5. The Agreement to Sell dated 2nd September, 2004 between the parties, in which the predecessor of the appellants and the respondents no.2 to 5 was described as the first party and the respondent no.1/plaintiff as the second party, *inter alia* provided as under:-

“That the first party hereby assure the second party that the above said flat is free from all sorts of encumbrances as mortgage lien, gift, decree charges, sale, dispute and there is no defect in his/her title of property otherwise or fail to sell then the first party shall be liable to indemnify the second party in full of losses sustained by second party and return the double amount of the advance amount of Rs.1,00,000/- received by the first party. In case second party fail to pay the full amount then not liable to get the advance back.”

6. It further contained an endorsement as under:-

“Received an additional amount of Rupees one lakh on 7.11.04. The balance amount of Rs.5.25 lakhs remains to be paid within 15 days.

*Jagdish Prasad
7/11/01”*

7. I will first deal with the second contention aforesaid of the appellants.

8. A perusal of the prayer paragraph in the plaint (in the suit from which this appeal arises) shows the respondent no.1/plaintiff to have, besides the relief of specific performance, also claimed the alternative relief of recovery of Rs.7.25 lacs along with interest at 24% per annum as well as the reliefs of declaration as illegal of the cancellation effected by the predecessor in interest of the appellants and the respondents no.2 to 5 of the Agreement to Sell and of injunction.

9. Though the contention of the counsel for the appellants is that the amount claimed of Rs.7.25 lacs in the alternative to the relief of specific performance is towards compensation/damages in lieu of specific performance, being the amount of the total sale consideration but I am unable to accept that in the face of such claim it can be said that the learned Addl. District Judge erred in granting the relief of recovery of money against the appellants and the respondents no.2 to 5. When a plaintiff in the suit

claims a larger relief, a smaller relief even if not clearly spelled out, can always be granted. Thus it cannot be said that there was no monetary claim in the suit. Moreover, the respondent no.1/plaintiff had also sought a declaration of the cancellation of the Agreement to Sell effected by the predecessor of the appellants and respondents no.2 to 5 as bad. In the cancellation so effected vide notice dated 16th December, 2004 proved as Ex.PW1/B, the predecessor of appellants and respondents no.2 to 5 had also claimed to have forfeited the said sum of Rs.2 lacs. It thus cannot be said that there were not pleadings with respect to the forfeiture of Rs.2 lacs or claim for refund thereof.

10. However this is not a case where the Court, though finding the purchaser to be not in breach, has in exercise of its discretionary power or for other reasons, denied the relief of specific performance, for a case for passing a decree in favour of the purchaser for recovery of any damages may arise.

11. Further, though this Court also in *Sudhir Rawal Vs. Satish Batra* MANU/DE/4485/2011 relying on *FatehChand* had held that in absence of proof of loss having been suffered, the earnest money cannot be permitted to be forfeited, but the Supreme Court in *Satish Batra Vs. Sudhir Rawal*

(2013) 1 SCC 345 has set aside the said judgment of this Court and held that a contract of security or earnest money is distinct from a contract of sale and the earnest money once paid belongs to the recipient and to be adjusted towards sale consideration if the giver performs the balance part of the agreement and to remain with the recipient if the giver does not proceed with the transaction. I have in ***Lalit Kumar Bagla Vs. Karam Chand Thapar & Bros. (CS) Ltd.*** MANU/DE/2870/2013 had occasion to analyze the said judgment (***Satish Batra***) and need is thus not felt to elaborate further on the matter.

12. However it still remains to be decided whether the entire amount of Rs.2 lacs was paid by the respondent no.1/plaintiff to the appellant by way of earnest money and in which case as per the dicta aforesaid ***Satish Batra*** the entire amount would be forfeited or only the amount of Rs.1 lac paid at the time of the Agreement to Sell and not Rs.1 lac paid on 7th November, 2004. The test in this regard after analysis of previous precedents has also been analyzed in ***Lalit Kumar Bagla*** as under:-

- i) that even in the absence of a clause for forfeiture there could be forfeiture depending on the nature and character of the payment and the intention of the parties and in determining

which, the designation used by the parties to indicate the nature of the sum that was paid though is relevant but not determinative;

- ii) that there is no distinction in this regard between contracts for sale of goods and contracts for sale of immovable property;
- iii) that it has to be determined, whether the money paid was intended to serve as earnest or security for performance, necessarily implying a liability to forfeit or as a part payment;
- iv) that if it is intended to serve as earnest or security for performance, even in the absence of a clause for forfeiture, it is liable to be forfeited upon breach of the contract by the giver;
- v) however the rule of forfeiture has no application to money received as part payment;

- vi) that the monies given as earnest or security for performance, once paid are and continue to remain the property of the recipient, having been paid as a contract of security which is distinct and separate from real or pure contract and the right to forfeiture arises under a contract of security which can be provided expressly or impliedly;
- vii) however to justify forfeiture, the terms of contract should be clear and explicit;
- viii) where the language used in the contract is neutral, then a payment will generally be interpreted as part payment so that it is, in principle, recoverable;
- ix) where the contract is of a sale and no property in goods has passed to the buyer, the money will generally be recoverable by the purchaser because the right of the vendor to retain the principal payment is conditional upon completion of the contract because when completion does not take place, the condition upon which the vendor retains the money fails

with the result that the money is recoverable by the purchaser; and,

- x) however where the contract is one for work and materials, the pre-payment is less likely to be recoverable because the recipient of money incurs expenditure in the performance of the contract and because the failure of consideration in such case is not total.

13. Seen in the aforesaid light, the sum of Rs.1 lac paid at the time of entering into the Agreement to Sell was definitely earnest money. The doubt if any arises with respect to the additional amount of Rs.1 lac paid on 7th November, 2004.

14. The time for completion of sale fixed in the Agreement to Sell dated 2nd September, 2004 was of two months. The additional amount of Rs.1 lac was paid after two months on 7th November, 200. Though the language of the endorsement made at the time of payment thereof does not provide that the same would also be non-refundable but the circumstances indicate that the said amount of Rs.1 lac was paid to keep the agreement alive for another 15 days and which would give the said amount of Rs.1 lac also the character

of earnest money in accordance with the dicta in the judgments aforesaid. I am therefore of the view that the entire amount of Rs.2 lacs received by the predecessor in interest of the appellants and the respondents no.2 to 5 was by way of earnest money and was non-refundable.

15. The judgment of the Single Judge based on the judgment of this Court which is no longer good law, thus cannot be sustained.

16. In the aforesaid light of the matter, need is not felt to deal with the other argument raised by the counsel for the appellants of the appellants having proved loss and being thus entitled to forfeiture though merit is found in which arguments also.

17. The appeal thus succeeds. The judgment and decree under appeal, to the extent directs the appellants and the respondents no.2 to 5 to refund the amount of Rs.2 lacs to the respondent no.1/plaintiff with interest is set aside. The counsel for the appellants under instructions however has fairly agreed that the appellant or the respondents no.2 to 5 shall not take any steps for recovering back Rs.50,000/- which has already been paid to the respondent no.1/plaintiff in pursuance to the decree.

18. The respondent no.1/plaintiff having not contested the appeal, no costs.

19. Decree sheet be drawn up.

20. The amount deposited by the appellants in this Court together with interest if any accrued thereon be forthwith refunded in the name of the appellant no.1 only, as requested by the counsel for the two appellants.

RAJIV SAHAI ENDLAW, J

DECEMBER 9, 2013

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